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SUPREME COURT, U. S.

Supreme Court of the United States

October Term, 1973

No. 72-914

SARAH SCHEUER, etc.,

Petitioner,

VS.

JAMES A. RHODES, et al.,

Respondents.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS, SIXTH CIRCUIT**

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR AMICUS CURIAE KENT LEGAL DEFENSE FUND

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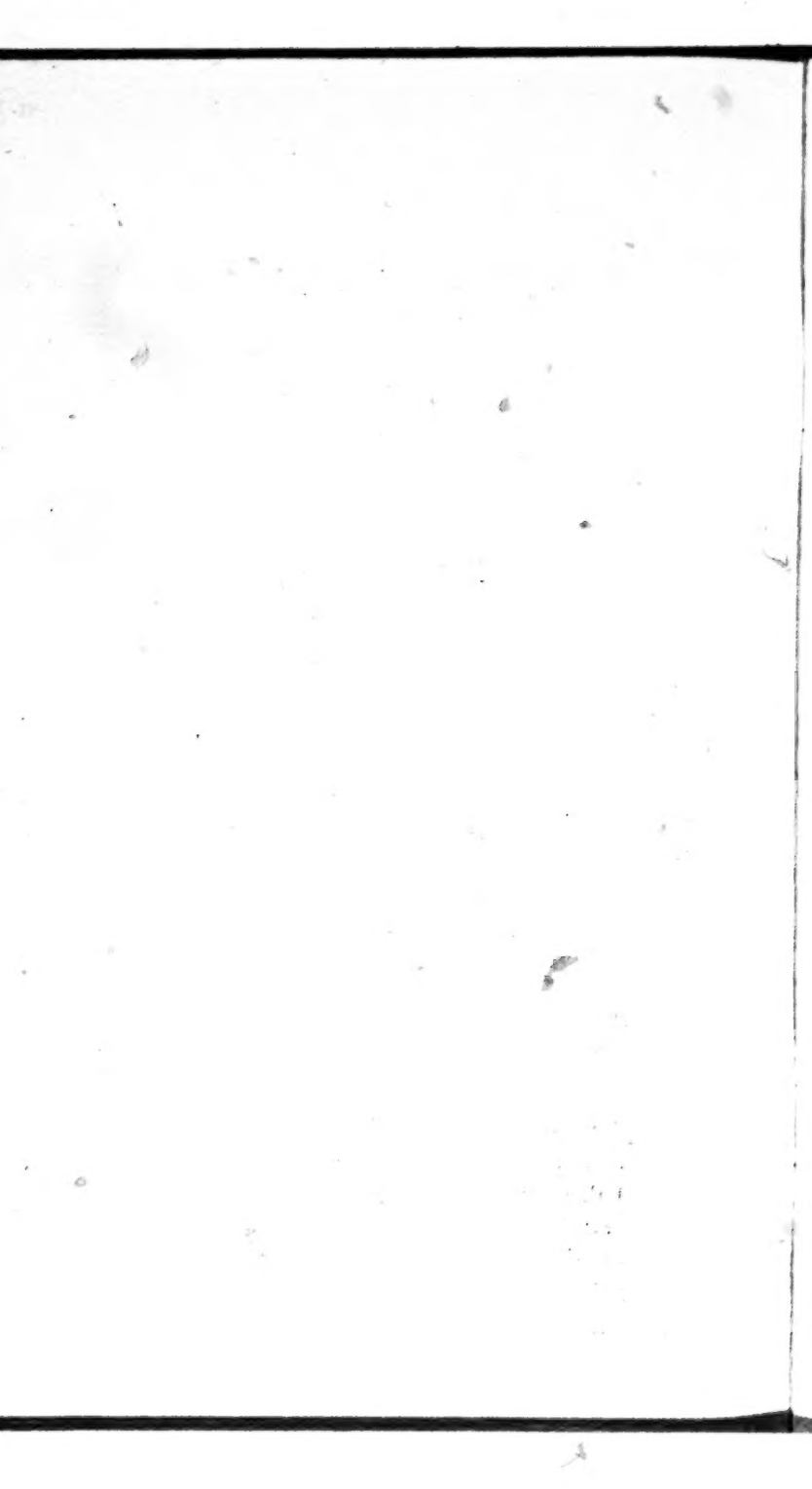
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MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

The Kent Legal Defense Fund (KLDF) respectfully moves the Court for leave to file the within Brief of Amicus Curiae.

KLDF is a non-profit Ohio Corporation organized to defend the students and faculty members accused of crimes as a result of the events at Kent State University, May 1 through May 4, 1970. The KLDF is composed of students and faculty of Kent State University and other residents of the area of Kent, Ohio. They lived through and were affected beyond measure by the killings which are the subject matter of the cases now before the Court.

The facts and circumstances set out in the within Brief are peculiarly within the knowledge of the KLDF. They are not likely to be brought to the Court's attention by the parties, but may be of value to the Court in resolving these cases.

More specifically, the matter contained in the Brief will demonstrate that the events at Kent had manifold ramifications, none of which have been thoroughly investigated and analyzed, and further that in events of these kinds a Federal forum is particularly necessary to ensure citizens of justice untrammelled by local passions and manipulation.

Respectfully submitted,

BENJAMIN B. SHEERER

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Attorneys for Amicus Curiae

BRIEF OF AMICUS CURIAE

The founding fathers foresaw the necessity of independent Federal Courts and Federal jurisdiction to protect citizens against matters contaminated with local passion. The Federalist 78, 79, 81 (Hamilton). The Congress and people have also seen this need and have placed certain matters within the protection of the Federal judiciary. (Fourteenth Amendment, 42 U.S.C. 1983, 28 U.S.C. 1343) The events related hereafter demonstrate the wisdom of these enactments.

The Kent Tragedy

In April 1970 President Nixon announced the invasion of Cambodia and shortly thereafter he called student demonstrators opposed to the war in Southeast Asia "bums". In reaction to these events, students at Kent State University began a series of protest demonstrations against the government's war policies in Southeast Asia. Kent State is Ohio's second largest state university and is located in rural Portage County.

On May 1 and 2 some students allegedly destroyed property in the city of Kent and on the campus (including the burning of the campus ROTC building). On May 2nd, Governor James A. Rhodes ordered the Ohio National Guard to Kent. At that time, the Governor was locked into a hotly contested primary battle with Senator Robert A. Taft. On May 3rd, the Governor visited the Kent Campus and in a televised press conference he bitterly

denounced the students, comparing them to brownshirts, nightriders, and communists.¹

On May 3, the National Guard broke up a sit-in demonstration at the edge of the Kent campus. Tear gas and bayonets were employed and hostility between students and the National Guard grew.

On May 4, 1970, shortly before noon, students gathered on the Commons at Kent State to protest the war in Southeast Asia and the presence of the National Guard on the campus. When the students did not yield to National Guard demands to end the rally, the Guard proceeded to disperse them by means of tear gas and armed formations of troops. In the ensuing action, members of the National Guard fired their weapons killing four students and wounding nine others.

The State Orders a Special Grand Jury

Against the background of tragedy and the intense publicity generated by the shootings, the Portage County Prosecuting Attorney decided that the County could not afford to investigate the events without a special financial grant from the State of Ohio.²

Governor Rhodes reviewed this request with his Attorney General and determined that under state law it could not be honored. The Governor decided, however, that he could direct his Attorney General (Paul W. Brown)

1. The Governor has said he was misquoted. For an assessment of the impact of these words, whether he was misquoted or not, see: *Kent State*, James A. Michener, Random House, 1971, pp. 251, 252.

2. The matters set out hereafter were proved and are from the records in *King v. Jones*, 319 F. Supp. 653 (N.D. Ohio 1970) and *Hammond v. Brown*, 323 F. Supp. 326 (N.D. Ohio 1971).

to conduct a Special Grand Jury to investigate the events at Kent.

The Attorney General was no stranger to the Kent events. Prior to Governor Rhodes' direction he had told the news media that he had no expectations that National Guardsmen would be indicted and that he "would be surprised if any Guardsmen were indicted".

Attorney General Brown proceeded to appoint three special Counsel to conduct the Special Grand Jury. On September 5th, 1970 and before the Grand Jury was seated, the judges of the Portage County Court of Common Pleas issued an extensive order.

The order excluded the news media from the Courthouse and made it clear that only persons with business at the Courthouse were to be found there. Of particular interest were paragraphs 5 and 7:

(5) Witnesses, prospective and selected jurors, and those persons summoned but excused from serving as Special Grand Jurors, are forbidden to participate in interviews and from making statements for publication from the date of the entry of this order and until such time as this Court shall see fit to vacate this order.

(7) All lawyers participating in the proceedings of this Special Grand Jury, their office associates, staff members and employees under their supervision and control are forbidden to take part in interviews for publication and from making extrajudicial statements from the date of this order and until such time as the Court shall vacate this order. Canon 20 of the Canons of Professional Ethics of the American Bar Association is hereby incorporated in and made a part of this order in so far as the same is applicable.

The Grand Jury was formally convened on September 14, 1970. Among the instructions given the jury was the following:

As a Grand Jury you are not a trying body. You are simply an accusing body. Therefore it is not your province to determine in any case whether a person who may be accused of having committed a crime or offense is really guilty.

A day or two after the Grand Jury was charged, however, the presiding Judge Edwin W. Jones, suggested to the Foreman, a former client and close friend, that the Grand Jury issue an essay report describing what had occurred at Kent State in May, 1970. Thereafter, the report was the subject of a luncheon meeting at a country club in Portage County. Attorney General Brown, his three special counsel, and the Grand Jury Foreman participated. The meeting discussed the content and format of the report.

The Chief Special Counsel, Robert Balyeat, himself prepared a draft of the first portions of the report. Thereafter, he and the foreman participated in writing and re-writing the drafts of the final portions of the report. Attorney General Brown saw at least two drafts of the report before its release. He testified that he had legally approved it before it was released.

On October 14, 1970 the Court of Common Pleas issued another order stating that it had:

come to the attention of the Court that the Special Grand Jury convened at the Portage County Courthouse on September 14, 1970 will be shortly completing its work and rendering its report to the Court

The Court then proceeded to ban all demonstrations, picketing, leafletting in the environs of the Court between 8:00 a.m. and 5:00 p.m. of each day. The next day this ban was extended to any hour of the day or night.

On the other hand, the Court suggested that some form of press conference be held when the Jury reported. Consequently, a second order issued on October 15, 1970 which provided:

Special Counsel for the Attorney General may hold one (1) press conference on October 16, 1970 at which they *may present to the news media* that portion of the report of the Special Grand Jury which is not secret and may answer only general questions pertaining to such portions of the report of the Special Grand Jury without giving evidence presented to the said Special Grand Jury or making any interpretation of such report. (Emphasis added.)

The Grand Jury then reported, returning thirty indictments against twenty-five persons and with the indictments an essay report commenting on the very events which were the subject of the indictments. Seventeen of the twenty-five persons indicted were charged with actions occurring on May 4, 1970 when the students were killed.

In the City Building of Ravenna, Ohio, the Special Counsel met with a hundred representatives of the news media to "present" this report. Copies of the report were made available to the media. (Of course, anyone who might have responded to the allegations in the report was under order of the court to remain silent.)

Shortly thereafter the report and its conclusions were nationwide, front page news. The Record-Courier, which serves the Kent community, ran the entire text of the report in its edition for that day.

The Grand Jury Report

The Report was a broadside attack on the university, its students, faculty and administration. It consisted of 18 pages purporting to authoritatively cover the events of May 1-4. The Report stated that "[t]he Grand Jurors have determined numerous questions of fact relative to the issues presented." It then proceeded to record those determinations of fact—no less than seventy in all. These facts were beyond doubt, it said. *It absolved the National Guard, but never once directly mentioned the killings.*

A typical passage of the report found:

... that the major responsibility for the incidents occurring on the Kent State University campus on May 2nd, 3rd and 4th rests clearly with those persons who are charged with the administration of the University. To attempt to fix the sole blame for what happened during this period on the National Guard, the students or other participants would be inconceivable. The evidence presented to us has established that Kent State University was in such a state of disrepair, that it was totally incapable of re-acting (sic) to the situation in any effective manner. We believe that it resulted from policies formulated and carried out by the University over a period of several years, the more obvious of which will be commented on here.

Another finding was:

A second example of where the University has obviously contributed to the crisis it now faces is the over-emphasis which it has placed and allowed to be placed on the right to dissent. Although we fully recognize that the right of dissent is a basic freedom to be cherished and protected, we cannot agree that the role of

the University should be to continually foster a climate in which dissent becomes the order of the day to the exclusion of all normal behavior and expression.

As might be expected, the president of Kent State University wished to reply to the report. Several requests for relaxation of the Court's gag order were unsuccessful. Finally, however, the Court issued a supplemental order granting President Robert I. White permission to hold two meetings on the report, but he was ordered to:

refrain from any critical comment regarding the report of the special Grand Jury.

Although President White felt constrained by the gag order, Special Prosecutor Seabury Ford did not. He granted an interview to a reporter of the Detroit Free Press in which he said that the National Guard should have killed more students. The Portage County Bar Association preferred charges against Ford for violating the gag order. He entered a plea of guilty for having given the interview.

Post-Report Litigation

The first case to be filed in the wake of these events was *King v. Jones*, 319 F. Supp 653, reversed in 450 F.2d 478 (6th Cir. 1971), but judgment of Court of Appeals vacated and case returned to District Court to be dismissed as moot at 405 U.S. 911 (1972). In *King* the District Court held that the absolute gag order on witnesses was unlawful after the Jury had reported. It also enjoined enforcing the ban on all demonstrations, leafletting and the like in the area of the Courthouse. Both these orders were held to be overbroad and hence trenching on First Amendment rights. The Court described the Grand Jury report as "essentially but one side of the argument".

Throughout the *King* litigation the state argued that the gag orders were issued solely from solicitude for the fair trial rights of the indictees. It was never explained why this concern served only to gag the indictees and members of the KSU community, but not the state.

The second case to follow the Grand Jury report was *Hammond v. Brown*, 323 F. Supp. 326 (N.D. Ohio 1971) affirmed 450 F.2d 480 (6th Cir. 1971). *Hammond* was brought by the KLDF to attack the pernicious results of the Special Grand Jury.

After trial the District Court in a thorough opinion determined that the issuance of the report contravened the presumption of innocence, eroded the right to fair trial, violated state law as to separation of powers and impaired the First Amendment rights of non-indicted students and faculty at Kent State. The Court ordered the report physically destroyed by burning. It declined to enjoin the prosecutions.

After affirmance by the Sixth Circuit, the report was destroyed and the state began to press the indictments to trial. Two of the twenty-five indictees entered pleas of guilty. Another was found guilty of a misdemeanor in connection with the May 2nd burning of the ROTC building. Two more of the indictees were acquitted at trial.

On December 7, 1971 the state moved the Court to dismiss the indictments against all remaining defendants for lack of evidence. These motions were granted. *Included in these were all seventeen of the persons indicted for the events of May Fourth.* Welcome as the dismissals were to the defendants, they could not repair the damage done by the actions of the State briefly outlined above. The State had indicted some of the victims of May Fourth by means of a manipulated Grand Jury proceeding and

after they had undergone the agonizing pressures of being indicted for crimes, simply dismissed the cases without affording them opportunity for vindication in open court.

CONCLUSION

The importance of the Federal relief provided in *King* and *Hammond* was immense. It served to preserve in very difficult circumstances essential elements of our constitutional system—free speech, fair trial, and presumption of innocence, among others.

The whole course of the special Grand Jury proceedings and its aftermath shows, however, that it was orchestrated and manipulated to produce absolution for the Ohio National Guard. The beneficiaries of this operation include some of the parties before the Court in this case.

When the mechanism of the state legal system is bent to the uses of those in power and authority, then, more than ever, the Federal remedy must be available.

Respectfully submitted,

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SUPREME COURT, U. S.

Supreme Court, U. S.

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IN THE

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OCTOBER TERM, 1973

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Sandra Lee Scheuer, Deceased,

Petitioner,

—v.—

JAMES RHODES, SYLVESTER DEL CORSO, ROBERT CANTERBURY, HARRY
D. JONES, JOHN E. MARTIN, RAYMOND J. SRP, Various Officers
and Enlisted Men, and ROBERT WHITE,

Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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